

**BOARD OF TRUSTEES OF THE CLERKS
AND LUMBER HANDLERS PENSION
FUND**

No. C 10-1757 MEJ

Plaintiff,

ORDER FOR CLERK OF COURT TO REASSIGN CASE

PIEDMONT LUMBER & MILL CO., INC.,

**REPORT & RECOMMENDATION
RE: DEFAULT JUDGMENT MOTION**

Defendant.

I. INTRODUCTION

Before the Court is Plaintiff Board of Trustees of the Clerks and Lumber Handlers Pension Fund's Motion for Default Judgment. (Dkt. #11.) As Defendant Piedmont Lumber & Mill Company has failed to respond to the motion or otherwise appear in this case, the Court hereby VACATES the December 2, 2010 hearing and ORDERS the Clerk of Court to reassign this case to a United States District Judge with the following Report & Recommendation.

II. BACKGROUND

Plaintiff Board of Trustees ("Plaintiff" or the "Board") of the Clerks and Lumber Handlers Pension Fund (the "Pension Fund") is, and at all relevant times was, the plan administrator and plan sponsor for the Clerks and Lumber Handlers Pension Plan (the "Plan"). (Compl., ¶ 4, Dkt. #1.) The Plan is, and at all relevant times was, a multi-employer plan and employee benefit plan within the meaning of Sections 3(2), 3(3), and 3(37) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (29 U.S.C. §§ 1102(1) or 1102(2), 1102(3), and 1102(37)). *Id.*

Defendant Piedmont Lumber & Mill Company, Inc. (“Defendant” or “Piedmont Lumber”) is an employer that participates in the Plan. *Id.* at ¶5. Piedmont Lumber entered into a collective

1 bargaining agreement with the Clerks and Lumber Handlers Local 886, which was effective July 1,
2 1996, as amended (the “CBA”). *Id.* at ¶ 6. The CBA obligates Piedmont Lumber to, among other
3 things, pay to the Pension Fund a contribution amount for every hour worked by its employees,
4 which is referred to as the “Required Contribution Rate.” In 2009, the Required Contribution Rate
5 was thirty cents (\$.30) for every hour worked by its employees. In 2010, the Required Contribution
6 Rate increased to forty cents (\$.40) for every hour worked. *Id.* at ¶ 7.

7 The CBA provides that Piedmont Lumber is bound to the provisions of the Trust Agreement
8 of the Clerks and Lumber Handlers Pension Fund (the “Trust Agreement”). *Id.* at ¶ 8. Under
9 Article III, Section 1 of the Trust Agreement, participating employers are required to make
10 contributions to the Pension Fund on or before the tenth (10th) day of each month. *Id.* at ¶ 9.
11 Pursuant to Article III, Section 1 of the Trust Agreement, participating employers are required to
12 submit to the Pension Fund (a) contributions covering the hours worked by its employees during the
13 prior month computed at the Required Contribution Rate set forth in the CBA and (b) a report of
14 hours worked by its employees for that month. *Id.* at ¶ 10. Under Article III, Section 1 of the Trust
15 Agreement, contributions are considered delinquent if due but unpaid after the tenth (10th) day of
16 the month in which the contribution to the Pension Fund is payable. *Id.* at ¶ 11.

17 Article III, Section 2 of the Trust Agreement provides that if a participating employer fails to
18 make the contributions due to the Pension Fund on or before the tenth (10th) day of the month in
19 which they are due, the employer must pay the following amounts to the Pension Fund: (1) interest
20 on the unpaid contributions at the rate of twelve percent (12%) per annum from the tenth (10th) day
21 of the month in which the contribution became delinquent until the date the contributions are paid to
22 the Pension Fund, and (2) an amount equal to the greater of (a) an amount equal to the interest
23 payable pursuant to (1) herein, or (b) liquidated damages in an amount equal to twenty percent
24 (20%) of the unpaid contributions. *Id.* at ¶ 12.

25 Under Article III, Section 2 of the Trust Agreement, a participating employer also becomes
26 liable for attorney’s fees incurred by the Pension Fund in connection with a participating employer’s
27 delinquency, regardless of whether legal or arbitration proceedings are instituted, plus court costs.
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1 The participating employer is also liable for any audit fees incurred by the Pension Fund in
2 connection with the participating employer's delinquency. *Id.* at ¶ 13.

3 Plaintiff maintains Contribution and Delinquency Rules and Procedures ("Delinquency
4 Procedures") for the Plan that are provided to all participating employers. *Id.* at ¶ 15. The
5 Delinquency Procedures reiterate the delinquency provisions provided for in the CBA and Trust
6 Agreement. *Id.* at ¶ 16. The Pension Fund administrator provided a copy of the Delinquency
7 Procedures to Defendant, and thus, Defendant was on notice of its obligations pursuant to the
8 Delinquency Procedures, the CBA, and the Trust. *Id.* at ¶ 17.

9 Defendant failed to make contributions to the Pension Fund from November 2009 through
10 March 2010, and to pay interest and liquidated damages on all delinquent contributions to the
11 Pension Fund from September 2009 through March 2010 as required by under the CBA and the
12 Trust Agreement. *Id.* at ¶ 18. Based on the monthly reports of hours worked by Defendant's
13 employees each month, and under the CBA, Trust Agreement, and Delinquency Procedures,
14 Defendant currently owes the Pension Fund the following:

- 15 a. Approximately \$27,068.85 in past due contributions for November 2009 through
16 March 2010 (*see* Delinquency Calculations, Exhibit 1, Dkt. #20);
17 b. Approximately \$2,859.90 in interest calculated based on an interest rate of twelve
18 percent (12%) from the delinquency date through November 18, 2010 on all past due
19 contributions from September 2009 through March 2010 (*see id.*);
20 c. All interest that has accrued since November 18, 2010 until the past due contribution
21 amount is paid to the Pension Fund;
22 d. Approximately \$8,311.81 in liquidated damages calculated based on a liquidated
23 damages rate of twenty percent (20%) from the delinquency date through November
24 18, 2010 on all past due contributions from September 2009 through March 2010 (*see*
25 *id.*);
26 e. All liquidated damages that have accrued since November 18, 2010 until the past due
27 contribution amount is paid to the Pension Fund; and

1 f. Attorney's fees and court costs incurred from March 1, 2010 through November 18,
2 2010.

3 *Id.* at ¶ 19.

4 According to Plaintiff, sometime in March 2010, all employees of Piedmont Lumber ceased
5 performing work covered under the CBA for which Defendant owes contributions to the Pension
6 Fund. *Id.* at ¶ 20. As a result of the delinquent contributions, liquidated damages, interest, and
7 attorney's fees owed by Piedmont Lumber, the Board filed the present Complaint against Piedmont
8 Lumber on April 23, 2010, and Defendant agreed to waive service of process on June 25, 2010. *See*
9 Dkt. #1 and #6. Plaintiff brought this action against Defendant under Section 302 of the Labor
10 Management Relations Act, as amended ("LMRA"), 29 U.S.C. § 186, and Sections 502 and 515 of
11 ERISA, 29 U.S.C. §§ 1132 and 1145. (Compl., Dkt. #1.)

12 Because Defendant did not file a responsive pleading, Plaintiff requested an entry of default
13 against Defendant, which was entered by the Clerk of Court on September 2, 2010. *See* Dkt. #7 and
14 #9. Plaintiff subsequently filed the present Motion for Default Judgment on October 15, 2010.
15 (Dkt. #11.) Defendant did not respond to Plaintiff's Motion for Default Judgment, and has not
16 otherwise appeared in this matter since the waiver of service.

17 III. DISCUSSION

18 A. Legal Standard

19 Pursuant to Federal Rule of Civil Procedure 55(b)(2), following default by a defendant, a
20 district court may enter default judgment in a case. It is well-settled that the district court's decision
21 whether to enter default judgment is discretionary. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir.
22 1980). To assist courts in determining whether default judgment is appropriate, the Ninth Circuit
23 has enumerated the following factors for courts to consider: (1) the possibility of prejudice to the
24 plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of the complaint; (4)
25 the sum of money at stake in the action; (5) the possibility of dispute concerning material facts; (6)
26 whether the defendant's default was due to excusable neglect and; (7) the strong policy underlying
27 the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d
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1 1470, 1471-72 (9th Cir. 1986).

2 Upon entry of default, the Court accepts all factual allegations within the complaint as true,
3 except those allegations relating to the amount of damages. *Televideo Sys., Inc. v. Heidenthal*, 826
4 F.2d 915, 917-18 (9th Cir. 1987). Concurrently, Federal Rule of Civil Procedure 54(c) provides
5 that, “[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in
6 the pleadings.” Thus, where a default judgment is granted, the scope of relief is limited to that
7 requested in the plaintiff’s complaint.

8 **B. Jurisdiction**

9 When entry of judgment is sought against a party who has failed to plead or otherwise
10 defend, a district court has an affirmative duty to look into its jurisdiction over both the subject
11 matter and the parties. *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). Here, the Court has subject
12 matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and ERISA § 502(e) because the
13 claims arise solely under federal law. The Court also has personal jurisdiction over this case
14 because the Plan is administered in this judicial district and payment of contributions to the Pension
15 Fund is also made within this judicial district, and Piedmont Lumber resides and does business
16 within this judicial district. (Compl. ¶ 2.) And, as Defendant waived service of process, proper
17 service is not at issue.

18 **C. Application of the *Eitel* Factors**

19 The undersigned next turns to application of the seven *Eitel* factors to determine whether
20 entry of default judgment is appropriate in this matter.

21 1. Prejudice to Plaintiffs

22 Under the first *Eitel* factor, this Court examines whether Plaintiff will suffer prejudice if
23 default judgment is not granted. *Eitel*, 782 F.2d at 1471. Here, the evidence presented shows that
24 Plaintiff will be prejudiced if the Court does not enter default judgment against Defendant because
25 Plaintiff has no other recourse for collecting the past due contributions owed to the Pension Fund. If
26 these contributions are not covered, future benefits for Plan participants and their beneficiaries may
27 be put at risk if the Plan is under funded. Thus, denial of Plaintiff’s request for entry of default

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1 judgment would substantially prejudice Plaintiff by preventing it from recovering against Defendant.

2 2. Sufficiency of the Complaint and Likelihood of Success on the Merits

3 The second and third *Eitel* factors address the sufficiency of Plaintiff's complaint and the
4 probability of its success on the merits of its claims. *Eitel*, 782 F.2d at 1471. The evidence
5 presented shows that Plaintiff has pled a meritorious claim. Defendant was obligated under the
6 terms of the CBA to make contributions to the Pension Fund and failed to do so from November
7 2009 through March 2010. Therefore, Piedmont Lumber is in clear violation of the terms of the
8 CBA, the Trust Agreement, and the Delinquency Procedures.

9 Further, Plaintiff's Complaint is legally sufficient because all of the elements of an ERISA §
10 515 violation have been pled. ERISA § 515 provides that “[e]very employer who is obligated to
11 make contributions to a multiemployer plan under the terms of the plan or under the terms of a
12 collectively bargained agreement shall, to the extent not inconsistent with law, make such
13 contributions in accordance with the terms and conditions of such plan or such agreement.” 29
14 U.S.C. § 1145. Here, the Complaint alleges that Piedmont Lumber is (1) an employer (2) who is
15 obligated under the terms of the CBA to make contributions to the Plan, an ERISA multi-employer
16 plan, and (3) failed to make contributions from November 2009 through March 2010. Because all of
17 the elements of an ERISA § 515 violation have been properly alleged, the Complaint is legally
18 sufficient and there can be no question that Plaintiff is likely to succeed on the merits of its claim.

19 3. The Sum of Money at Stake in the Action

20 The fourth *Eitel* factor assesses the reasonableness of the potential award if a default
21 judgment is entered against Defendant. *Eitel*, 782 F.2d at 1471. In making this evaluation, the
22 Court must take into account the amount of money at stake in relation to the seriousness of the
23 defendant's conduct. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002).
24 If the sum of money at issue is reasonably proportionate to the harm caused by the defendant's
25 actions, properly documented, and contractually justified, then default judgment is warranted. *Bd. of
26 Trustees of Cal. Metal Trades v. Pitchometer Propeller*, No. C 97-2661, 1997 WL 797922, at *1 (N.
27 D. Cal. Dec. 15, 1997).

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1 Here, the amount of money at stake in this litigation is significant. As of November 18,
2 2010, Piedmont Lumber owes \$38,240.56 in past due contributions, interest and liquidated damages.
3 In addition, as discussed below, Piedmont Lumber owes attorney's fees and costs incurred by the
4 Pension Fund in pursuing this litigation. If these contributions and attorney's fees are not covered,
5 future benefits for Plan participants and their beneficiaries may be put at risk if the Plan is under
6 funded. Thus, the damages Plaintiff seeks are proportionate to the harm Defendant caused, are
7 justified under the Policy, and are properly documented. This factor therefore favors entry of default
8 judgment against Defendant.

9 4. Possibility of Dispute Concerning Material Facts

10 The fifth *Eitel* factor examines the possibility of dispute as to any material facts of the case.
11 *Eitel*, 782 F.2d at 1471-72. Here, because Piedmont Lumber submitted reports for hours worked by
12 covered employees from November 2009 through March 2010, there is no dispute as to the amount
13 of delinquent contributions owed. (Dkt. #20, Ex. 1.) Accordingly, the undersigned finds that this
14 factor weighs in favor of entry of default judgment.

15 5. Possibility of Excusable Negligence

16 The sixth *Eitel* factor examines whether Defendant's failure to respond to Plaintiff's
17 Complaint was the result of excusable neglect. *Id.* at 172. In this case, Piedmont Lumber was aware
18 of Plaintiff's complaint filed against it and voluntarily waived service. Therefore, Piedmont Lumber
19 consciously decided not to respond to Plaintiff's Complaint and Motion for Default Judgment.
20 Therefore, this factor weighs in favor of entry of default judgment.

21 6. Policy for Deciding on the Merits

22 The final *Eitel* factor examines whether the policy of deciding a case based on its merits
23 precludes entry of default judgment. *Id.* In *Eitel*, the Ninth Circuit acknowledged that, the general
24 rule is that default judgements are ordinarily disfavored and that courts should decide cases on their
25 merits whenever possible. *Id.* However, courts have also recognized that the mere existence of Rule
26 55(b) indicates that the preference for a decision on the merits, standing alone, is not dispositive.
27 See, e.g., *Bd. of Trustees of Auto. Indus. Welfare Fund v. Concord Car, Inc.*, No. C 95-4039, 1996

1 WL 382845, at *2 (N.D. Cal. July 1, 1996). When a party fails to defend against an action and
2 delays a decision on the merits, as is the case here, then the preference does not preclude the Court
3 from granting default judgment. *Id.* Because Defendant has failed to participate in this lawsuit by
4 appearing and filing an answer to Plaintiff's Complaint, a decision on the merits would be
5 impracticable, if not impossible. *Id.* Thus, this factor weighs in favor of entry of default judgment.

6 7. Conclusion

7 Based on this analysis, the undersigned finds that the *Eitel* factors weigh in favor of an entry
8 of default judgment against Defendant. Accordingly, the undersigned shall now determine the
9 appropriate damages that should be awarded to Plaintiff.

10 D. **Damages**

11 ERISA § 515 obligates participating employers under the CBA and Trust Agreement "to
12 make contributions to a multiemployer plan under the terms of the plan or under the terms of a
13 collectively bargained agreement shall, to the extent not inconsistent with law, make such
14 contributions in accordance with the terms and conditions of such plan or such agreement." 29
15 U.S.C. § 1145. By failing to make contributions to the Pension Fund from November 2009 to March
16 2010, Defendant has violated ERISA § 515. Thus, ERISA § 502(g)(2) provides for the entry of
17 judgment against Defendant for payment of the unpaid contributions, interest, liquidated damages,
18 reasonable attorney's fees and costs, and other appropriate legal or equitable relief.

19 An award under ERISA § 502(g)(2) is mandatory if the following requirements are satisfied:

20 (1) the employer is delinquent at the time the action is filed; (2) the district court has entered a
21 judgment against the employer; and (3) the plan provides for such an award. *Northwest Adm'rs, Inc.*
22 *v. Albertson's, Inc.*, 104 F.3d 253, 258 (9th Cir.1996) (quoting *Carpenters Amended and Restated*
23 *Health Benefit Fund v. John W. Ryan Constr. Co., Inc.*, 767 F.2d 1170, 1175 (5th Cir.1985))
24 ("[M]andatory fees are available under § 1132(g)(2) 'notwithstanding the defendant's post-suit,
25 pre-judgment payment of the delinquent contributions themselves.'"); *Idaho Plumbers & Pipefitters*
26 *Health & Welfare Fund v. United Mechanical Contractors, Inc.*, 875 F.2d 212, 215-16 (9th Cir.
27 1989) ("[W]hen (1) the fiduciary obtains a judgment in favor of the plan, (2) unpaid contributions

exist at the time of suit, and (3) the plan provides for liquidated damages,” section 1132(g)(2) is triggered and a liquidated damage award is mandatory.). Courts have held that a plaintiff may receive a judgment for contributions which became due after the lawsuit was filed and remained unpaid at the time of the judgment. *See Iron Workers Dist. Council v. Hudson Steel Fabricators & Erectors, Inc.*, 68 F.3d 1502, 1507 (2nd Cir.1995) (“the amount of an award of interest or liquidated damages should logically be predicated upon the amount of the unpaid contributions originally at issue, whether or not outstanding at the time of judgment, since that amount correctly measures the damage caused by the delinquency.”); *Board of Trustees of the Sheet Metal Workers v. General Facilities, Inc.*, 2003 WL 1790837, * 2 (N.D. Cal. March 31, 2003) (citing *Carpenters & Joiners Welfare Fund v. Gittleman Corp.*, 857 F.2d 476, 478 (8th Cir. 1988)) (“Section 1132 provides for liquidated damages as a percentage of ‘unpaid contributions’ and courts have interpreted ‘unpaid contributions’ to mean contributions owing and unpaid at the time the lawsuit is filed.”).

1. Unpaid Contributions and Liquidated Damages

14 Here, as discussed above, Plaintiff has satisfied all of the statutory requirements and is
15 entitled to relief for all unpaid contributions, plus interest and liquidated damages, that have not
16 been satisfied. Based on the monthly reports of hours worked by Defendant's employees each
17 month, and under the CBA, Trust Agreement, and Delinquency Procedures, Defendant currently
18 owes the Pension Fund the following:

- a. Approximately \$27,068.85 in past due contributions for November 2009 through March 2010;
- b. Approximately \$2,859.90 in interest calculated based on an interest rate of twelve percent (12%) from the delinquency date through November 18, 2010 on all past due contributions from September 2009 through March 2010;
- c. All interest that has accrued since November 18, 2010 until the past due contribution amount is paid to the Pension Fund;
- d. Approximately \$8,311.81 in liquidated damages calculated based on a liquidated damages rate of twenty percent (20%) from the delinquency date through November

1 18, 2010 on all past due contributions from September 2009 through March 2010;
2 and

3 e. All liquidated damages that have accrued since November 18, 2010 until the past due
4 contribution amount is paid to the Pension Fund

5 (Delinquency Calculations, Exhibit 1, Dkt. #20.) Based on these calculations, the undersigned finds
6 an award of \$38,240.56 for delinquent contributions, interest and liquidated damages is proper and
7 recommends that the District Court award the full amount to Plaintiff.

8 2. Attorney's Fees and Costs

9 Pursuant to the CBA and the Trust Agreement and under ERISA § 502(g)(2), Defendant is
10 responsible for paying the Board for the attorney's fees and expenses it incurred to enforce
11 collection of delinquent contributions. Since March 5, 2010 through November 18, 2010, Plaintiff
12 claims that it has incurred \$26,707.50 in attorney's fees and costs in attempting to resolve
13 Defendant's delinquency and in bringing this lawsuit. The work performed by legal counsel for the
14 Board included (a) contacting Defendant via letters, emails, and telephone calls; (b) determining the
15 extent and amount of the delinquency; (c) preparing and filing the initial complaint and other
16 case-initiating documents; (d) preparing the Request for Entry of Default; (e) preparing the Motion
17 for Default Judgment in this action; and (f) preparing Proposed Findings of Facts and Conclusions of
18 Law. (*See* Trucker Huss Billing Records, Exhibit 2, Dkt. #20.)

19 In reviewing the submitted billing records, the undersigned notes that Plaintiff's counsel has
20 spent a considerable amount of time in resolving Defendant's delinquency, and finds that the
21 requested fees and costs were reasonable in light of Defendant's continuing violation of ERISA, the
22 CBA, and the Trust Agreement. Based on declarations submitted by Plaintiff in support of its
23 motion for default judgment, the undersigned finds the rates charged by Trucker Huss attorneys for
24 this matter are reasonable rates that are in line with those prevailing in the San Francisco Bay Area
25 for similar services of lawyers of reasonably comparable skill and reputation. (*See* Docket #13, C.
26 Mark Humbert Declaration at ¶¶10-11; Docket #12, Michelle L. Schuller Declaration at ¶¶10-17.)
27 The Board has also submitted a copy of attorney billing to date related to Defendant's delinquency

1 in support of the Board's request for an award of attorney's fees and costs. (*See Exhibit 2, Dkt.*
2 #20.) The time spent on matters relating to Piedmont Lumber's delinquency appears reasonable.
3 The undersigned therefore recommends that the District Court award Plaintiff \$26,707.50 in
4 attorney's fees and costs.

5 **E. Audit and Continuing Obligations under the CBA and Trust Agreement**

6 In addition to recovery of the principal amount of delinquent contributions, liquidated
7 damages, interest on the principal amounts of contributions and on liquidated damages and
8 attorney's fees and costs, the Pension Fund also seeks default judgment in the form of orders
9 compelling Defendant to: (a) submit to an audit by the Pension Fund, at Defendant's expense, to
10 determine the extent of Defendant's delinquency and ability to meet its obligations under the CBA
11 and the Trust Agreement; and (b) perform and continue performing its obligations under the CBA
12 and the Trust Agreement. Pursuant to Article III, Section 5 of the Trust Agreement, the Pension
13 Fund has the authority to audit contributing employers by giving the Board the power to "examine
14 and copy any such books, records, papers or reports of such individual employer as may be
15 necessary to determine whether the individual employer is making full and prompt payment of all
16 sums required to be paid by him or it to the Pension Fund."

17 The undersigned finds Plaintiff's request reasonable in light of Defendant's ongoing
18 obligation to make contributions and to submit reports of hours to the Pension Fund in accordance
19 with the CBA and the Trust Agreement and Defendant's demonstrated failure to make timely and
20 complete contributions to the Pension Fund. Accordingly, the undersigned recommends that the
21 District Court order that Defendant: (a) submit to an audit by the Pension Fund, at Defendant's
22 expense, to determine the extent of Defendant's delinquency and ability to meet its obligations under
23 the CBA and the Trust Agreement; and (b) perform and continue performing its obligations under
24 the CBA and the Trust Agreement in the event that there are employees of Piedmont Lumber who
25 continued to perform work covered under the CBA after March 2010.

26 **IV. CONCLUSION**

27 Based on the foregoing analysis, the Court **RECOMMENDS** that the District Court
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GRANT Plaintiff's Motion for Default Judgment as follows:

- 1) award Plaintiff \$38,240.56 for delinquent contributions, interest and liquidated damages;
- 2) award Plaintiff \$26,707.50 in attorney's fees and costs; and
- 3) order that Defendant: (a) submit to an audit by the Pension Fund, at Defendant's expense, to determine the extent of Defendant's delinquency and ability to meet its obligations under the CBA and the Trust Agreement; and (b) perform and continue performing its obligations under the CBA and the Trust Agreement in the event that there are employees of Piedmont Lumber who continued to perform work covered under the CBA after March 2010.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(2), a party may serve and file objections to this Report and Recommendation 14 days after being served.

IT IS SO ORDERED.

Dated: November 29, 2010

Maria-Elena James
Chief United States Magistrate Judge